Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

EARL FOREMAN,

Petitioner,

vs.

BABCOCK & WILCOX COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. What evidence is required under the Americans with Disabilities Act to establish that an employee has a disability?

2. Does the Americans with Disabilities Act require that an employer attempt to accommodate a disability before it may decide that he is not "qualified" to perform his job because of the disability?

3. Does the Americans with Disabilities Act require an employer to attempt the accommodation of having other employees do job tasks which a disabled worker cannot perform, while the disabled worker performs duties he is able to perform?

4. May an employer refuse to accommodate an employee by moving him to a vacant position on the grounds that such a move would be inconsistent with a Union contract?

5. Is a broad or restrictive interpretation to be given to the Americans with Disabilities Act?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents . . . . . ii-iii

Table of Authorities . . . . . iv-v

Opinions below 1

Jurisdiction 2

Statutory Provision Involved 2

Statement of the Case 3

Facts 4

Argument I 6

The Writ Should Be Granted, Since The Fifth Circuit Applied An Overly-Restrictive Definition Of "Disability." This Interpretation Is Inconsistent With The Language Of The Statute, The EEOC Regulations And Opinions Of Other Circuits

Argument II 9

The Court Of Appeals' Holding That Defendant Could Not "Accommodate" Foreman's Disability Was Made Without Requiring Defendant To Make Any Effort To "Accommodate" Foreman's Disability. This Holding Contravenes Holdings In Other Circuits.

Argument III 10

This Court Should Accept Certiorari Because The Fifth Circuit's Holding That The Union Contract Precluded Defendant From Attempting To Accommodate Foreman By Moving Him To Other Level Seven Positions Other Than Expediter Conflicts With Other Circuits

Contents

Argument IV 13

The Fifth Circuit's Narrow, Restrictive Interpretation Of The Americans With Disabilities Act Is Inconsistent With The Beneficial, Broad Interpretation Which Should Be Given Civil Rights Law.

Appendix A 14

Appendix B 16

Appendix C 21

TABLE OF AUTHORITIES

CASES: *Page*

Aka v. Washington Hospital Center,
116 F.3d 876 (D.C. Cir. 1997) 11-12

Alexander v. Choate, 269 U.S. 287 (1985) 10

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)(en banc) . 4

Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1995) 13

Bultemeyer v. Fort Wayne Community Sch. Dist.,
100 F.3d 1281 (7th Cir. 1996) 9-10

Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1997),
cert. denied, ____ U.S. ___, 137 L.Ed.2d 480 (1997) . . . 11-12

Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 809-810
(5th Cir. 1997) 2, 11

Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996) 7

Holt v. J. T. M. Industries, Inc., 89 F.3d 1224 (5th Cir. 1996) . . 13

Jimieno v. Mobile Oil Corp., 66 F.3d 1514 (9th Cir. 1995) 7

Miners v. Fargill Communications, Inc., 113 F.3d 820, 823-24
(8th Cir. 1997) 7

Monell v. New York County Department of Social Services,
426 U.S. 658, 58 L.Ed.2d 611, 631-32, 98 S.Ct. 2018 (1978) 13

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 9

Robinson v. Global Marine Drilling Co., 101 F.3d 35
(5th Cir. 1996) 13

Authorities

page

Rogers v. International Terminal Inc., 87 F.3d 755 (5th Cir. 1996) 13

Southeastern College v. Davis, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct. 2361 (1979) 10

Tuck v. HCA Health Serv. of Tenn., 7 F.3d 465 (6th Cir. 1993) . 10

Turco v. Hoechst Celanese Corp., 101 F.3d 1090 (5th Cir. 1996) 13

OTHER AUTHORITY:

28 U.S.C. § 1254 2

29 C.F.R. § 1630.2(j) 1, 8

42 U.S.C. § 12102(2) 2, 6-8

42 U.S.C. § 12111 . . . . . 2, 12

42 U.S.C. § 12112 . . . . . 3, 12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The United States District Court for the Northern District of Mississippi's judgment of dismissal is Appendix "A." The District Court's transcribed opinion granting judgment as a matter of law is Exhibit "B." The final opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment as a matter of law on Petition for Rehearing is Appendix "C," and is reported at 117 F.3d 800 (1997). The original opinion of the Fifth Circuit, now withdrawn, is identical to the opinion on Petition for Rehearing, except that the opinion on Petition for Rehearing added the following under the heading, *Substantial Limitation*:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. 29 C.F.R. § 1630.2(j), App. (1996).

> After reviewing the entire record, we hold that Foreman has offered no evidence upon which a jury could conclude that his heart condition, prior to the installation of his pacemaker, significantly restricted his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

Foreman v. Babcock & Wilcox, 117 F.3d 800 (5th Cir. 1997)

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on July 10, 1997, through Writ of Certiorari under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The statute involved is the Americans with Disabilities Act. 42 U.S.C. § 12102(2) provides:

> The term "disability" means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12111:

> (8) The term "qualified individual with a disability" means an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires . . .
> (9) The term "reasonable accommodation" may include -
>
> (B) job restructuring . . . reassignment to a vacant position . . . and other similar accommodations . . .

42 U.S.C. § 12112:

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability . . .
>
> (b) As used in subsection (a), the term "discriminate" includes -
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship) includes a relationship with a . . . labor union . . .
>
> 5(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

STATEMENT OF THE CASE

After the defense rested, following a jury trial, the District Court for the Northern District of Mississippi entered judgment as a matter of law for the employer in this Americans with Disabilities Act case. The United States Court of Appeals for the Fifth Circuit upheld judgment as a matter of law in favor of the employer (Respondent). On Foreman's Petition for Rehearing the Court of Appeals adhered to its original opinion with a minor modification. The Court of Appeals held (1) that Foreman's severe heart problems did not amount to a "disability" within the meaning of the Americans with Disabilities Act; (2) that Foreman's pacemaker rendered him not "qualified" to continue as an "expediter" at Defendant's West Point, Mississippi plant; and (3) that the Union contract excused Defendant's failure to accommodate by giving Foreman an equal, alternative position.

(FACTS)

The following facts were developed during the trial in the United States District Court for the Northern District of Mississippi.[1]

Petitioner, Earl Foreman, worked for Defendant for twenty-two (22) years. His seniority under the Union contract entitled him to a "level seven" position as an expediter. R. Vol. 3 at 50. As an expediter, Foreman's duties were to unload trucks, receive materials, store inventory, and disburse materials into the "shop" area, which contains welding machines. *Id.* at 16. Foreman had a long history of heart problems, which necessitated the installation of a "pacemaker." *Id* at 51. According to Foreman's physician, without the "pacemaker," Foreman would have a "very miserable life" and his "everyday life activities" would be "severely impaired." *Id.* at 10. After the physician installed the pacemaker, he released Foreman to return to work, with the sole restriction that he was not to be within six (6) feet of welding machines. *Id.* at 105-106. The "shop" contained welding machines, and one duty of an expediter was carrying materials into the shop. R. Vol. 4 at 7.

While Foreman's only limitation was not going into the shop, Defendant's Safety Administrator would not allow Foreman to return to work in any position. When Foreman told the Safety Administrator about the restriction, the Safety Administrator responded that he had "heard enough" and that Defendant was going to put Foreman on his "disability retirement." R. Vol. 3 at 55-56. The Safety Administrator told Foreman that he should see a doctor to get a letter stating he is "disabled," *Id.* at 60, and that he was "not going to come back into Defendant's plant for any reason." *Id.* at 61. The Safety Administrator even told Foreman that if his doctor would not find him disabled, the company doctor would. *Id.* at 64. Foreman, therefore, filed an EEOC charge stating:

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[1] This Court will note a radical difference between the "facts," as stated by Petitioner, and the "facts," contained in the opinion of the Fifth Circuit, attached hereto as Appendix "C." Petitioner has stated the facts in the light most favorable to himself as nonmovant, which is the correct method. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). The Fifth Circuit's opinion, which states the facts in favor of the movant, and ignores the facts of the nonmovant, is such a clear violation of the procedure governing motions for judgment as a matter of law, that this case qualifies for certiorari under this Court's supervisory power over the lower federal courts.

> I have had a pacemaker installed and I am not allowed to go back to my position in the welding department. However, there are jobs I could do at B&W, but they refused to accommodate me by permitting me to do these other jobs. . . Also, Babcock & Wilcox instructed me to tell the doctors to write me a letter saying that I could not do my work. This was false, since I am capable of doing my work, but B&W wanted this letter written anyway.

R. Vol. 1 at 3.

After Foreman filed his EEOC charge, Defendant reversed its position and agreed to allow Foreman to return to work as a janitor. R. Vol. 3 at 68. A janitor is a level one or entry level position, paying substantially less than the expediter's level seven job. *Id.* at 96.

Foreman commenced this litigation, complaining that Defendant would not attempt to "accommodate" him in his expediter's position and would also not allow him to move to other equal positions at the level seven pay scale. Foreman's case relied upon testimony of a fellow expediter that there was ample work for an expediter outside the shop and there was no necessity for all expediters to go into the shop. In the past, expediters informally agreed among themselves as to division of job duties, and the employer's practice was to always keep at least one expediter in the receiving area, away from welding machines. *Id.* at 27.

As an alternative to adjusting his job duties, Foreman claimed that he should have been given an alternate job, either as an inventory specialist or a materialsman . Id. at 27. Foreman had more experience in inventory than the person selected for the newly-created inventory specialist position, and also had experience as a materialsman, qualifying him for the materialsman position. R. Vol. 3, p. 223.[2]

---

[2] At trial, Defendant claimed that Foreman was not "qualified" for the materialsman position under the Union contract because he had not filled that vacancy before. Foreman had filled the position of materialsman prior to the company's dividing it into the subcategories of Materialsman A and Materialsman B. R. Vol.3, p. 223. Contrary to the facts in the Court of Appeals opinion that there was never any contention that Foreman was not qualified to be an inventory specialist, except for the Union contract's seniority provisions. Foreman had more experience in inventory than the person who was given the vacant position. R. Vol.3, p. 223.

After the defense rested, the District Court granted judgment as a matter of law for the employer, accepting the testimony of the employer that going into the shop was an "essential function" of the expediter's position, and that Defendant was not required to accommodate by allowing Foreman to do other duties while fellow expediters carried materials into the shop. Additionally, the District Court ruled that the employer is not required to make other positions available as accommodation, since this is inconsistent with the Union contract which fills vacancies on a seniority basis. R. Vol. 2 at 511-512. Foreman timely appealed. R. Vol. 2 at 511.

The Fifth Circuit ruled that because of Foreman's inability to go into the shop, he was not "qualified" to be an expediter. The Fifth Circuit also held that the Union contract validly prohibits Foreman from moving to other positions. Even though the employer had not raised this issue on appeal, the Fifth Circuit also held that Foreman did not even have a "disability" within the meaning of the Americans with Disabilities Act, since there were many jobs which Foreman would be qualified to do.

Believing that the restrictive opinion of the Fifth Circuit seriously undermines the beneficial purposes of the Americans with Disabilities Act, and is inconsistent with other circuits, Foreman requests that this Court hear the case.

ARGUMENT I

THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT APPLIED AN OVERLY-RESTRICTIVE DEFINITION OF "DISABILITY." THIS INTERPRETATION IS INCONSISTENT WITH THE LANGUAGE OF THE STATUTE, THE EEOC REGULATIONS, AND OPINIONS OF OTHER CIRCUITS.

On its own motion, and without the point ever being raised by the employer, the Fifth Circuit held that Foreman has no disability. The Americans with Disabilities Act defines disability as:

42 U.S.C. § 12102(2)

. . . (A) a physical or mental impairment that

> substantially limits one or more of the major life activities of such an individual, (B) a record of being impaired, or (C) being regarded as having such an impairment.[3]

Regarding the third component of the definition of disability (i.e., being "regarded" as having a disability), Foreman testified that upon the employer's agent being told of Foreman's work restriction, he responded that Foreman would "not be coming back" into Defendant's plant "for any reason" and that he would draw his "disability retirement." Foreman was not allowed to return to work until he filed an EEOC charge, and, then, was only given a position as a janitor. Telling one to draw his "disability retirement," and not allowing him to work is the clearest possible method of demonstrating that one is "regarded" as having a disability.

Unlike the Fifth Circuit Court of Appeals, other courts of appeals have been willing to apply the third component of the definition of disability. See, *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996) (Employer's knowledge of plaintiff's medical history, and sending him to counseling, was sufficient to allow a jury to infer that the employer "regarded" him as having a disability); *Miners v. Fargill Communications, Inc.*, 113 F.3d 820, 823-24 (8th Cir. 1997) (Giving employee a choice between being fired and entering a chemical abuse program indicated that the employer "regarded" employee as having a disability); *Jimieno v. Mobile Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995) (The fact that the employer terminated employee by relying on reports that his spinal impairment would put him "at risk," demonstrated that the employer "regarded" plain- tiff as having a disability).

Thus, other circuits are willing to recognize 42 U.S.C. § 12102(2), but the Fifth Circuit does not, since its opinion ignores those facts demonstrating that the employer "regarded" Plaintiff as having a disability.[4]

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[3] Unfortunately, the Fifth Circuit ignored a fundamental principle of appellate jurisdiction by omitting those facts in favor of the movant, by stating that "one would not realize that Foreman clearly had a disability if one read only the 'facts' as stated in the opinion."

[4] Ignoring the fact which supports the nonmovant when approving judgment as a matter of law should be sufficient reason to grant the Writ, under this Court's supervisory power.

In addition to refusing to apply component (C) of the Americans with Disabilities Act, the Fifth Circuit also seriously misunderstood, or refused to apply component (A) of the definition. Foreman's physician testified that, except for the pacemaker, Foreman's major life activities would be "severely impaired." R. Vol. 3 at 10. To have substantially limited "major life activities" is to have a "disability." 42 U.S.C. § 12102(2)(A).

In determining whether one's life activities are substantially impaired, the EEOC regulations provide that "mitigating measures," such as the pacemaker, are not to be considered. 29 C.F.R. § 1630.2(j) says:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case-to-case basis without regard to mitigating measures, such as medicines, or assistive or prosthetic devices. (Emphasis supplied).

While Foreman's everyday life activities (other than working around welding machines) were not substantially limited once the pacemaker was installed, Foreman's everyday life activities were significantly impaired prior to the installation of the pacemaker. By holding that Foreman did not present evidence sufficient to create a jury question on the issue of whether he had a "disability," under subsection (A), the Fifth Circuit refused to apply the EEOC regulations providing that "disability" is to be determined "without regard to" assistive devices.

This Court's supervisory power over the Courts of Appeals should be utilized to require that the EEOC's implementing regulations be followed, or, at least, some rationale be given for refusing to follow them.

ARGUMENT II

THE COURT OF APPEALS HOLDING THAT DEFENDANT COULD NOT "ACCOMMODATE" FOREMAN'S DISABILITY WAS MADE WITHOUT REQUIRING DEFENDANT TO MAKE ANY EFFORT TO "ACCOMMODATE" FOREMAN'S DISABILITY. THIS HOLDING CONTRAVENES HOLDINGS OF OTHER CIRCUITS.

Besides holding that Foreman's heart problems did not amount to a "disability," the Fifth Circuit also held that Foreman's alleged disability rendered him not "qualified" for a position as an expediter. Plaintiff was, thus, the victim of the classic Americans with Disabilities Act "Catch 22," in which he is found to be both insufficiently handicapped to have a disability and too handicapped to be "qualified" for the job.[4] Essentially, the Fifth Circuit accepted as conclusive, the testimony of the employer that going into the shop area was an "essential" qualification for the job. This holding was made despite the fact that Foreman and a fellow expediter testified that it was not necessary for all expediters to enter the shop area, and that the employer could "accommodate" Foreman by allowing at least one expediter to work outside the shop. By accepting the employer's opinion that going into the shop was essential for an expediter, while disregarding the employee's opinion to the contrary, the Fifth Circuit failed to follow both the Senate Report (at 34) and House Report (at 66), which note that the employee is in the better position to know whether an accommodation is feasible.

Also, the Fifth Circuit's deciding this issue as a matter of law in favor of employer is in serious conflict with *Bultemeyer v. Fort Wayne Community Sch. Dist.*, 100 F.3d 1281 (7th Cir. 1986), which held that an employer, before moving an employee on the grounds that his disability makes him unqualified, must at least communicate with him in an attempt to restructure the job to accommodate him. By holding that the employer need not make any effort to adjust the job,

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[5] This overly-restrictive circular definition of "qualified" and "disabled" was criticized by the Ninth Circuit in Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987).

or to communicate with Foreman about what adjustment might be made, the Fifth Circuit conflicts with *Bultemeyer*. Likewise, the Fifth Circuit's restrictive view is inconsistent with this Court's view expressed in cases under The Rehabilitation Act of 1973. See, *Southeastern College v. Davis*, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct. 2361 (1979) which said:

> The refusal to modify an existing program to accommodate the handicapped individual would be unreasonable and therefore discriminatory.

See also *Alexander v. Choate*, 269 U.S. 287 (1985) (Unqualified refusal to modify a job requirement that excludes the handicapped violates The Rehabilitation Act of 1973).

Most significantly, the Fifth Circuit's opinion conflicts with *Tuck v. HCA Health Serv. of Tenn.*, 7 F.3d 465, 473 (6th Cir. 1993). *Tuck* held that an employer's duty of reasonable accommodation required an employee to modify a nurse's position to allow other nurses to do "heavy lifting," which plaintiff could not do, while plaintiff reciprocated by doing non-lifting nursing duties. The Fifth Circuit held just the opposite in this case, when it held that the employer need not allow other employees to go into the shop while Foreman did other employees' duties. These conflicts among the circuits justify grant of certiorari.

ARGUMENT III

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S HOLDING THAT THE UNION CONTRACT PRECLUDED DEFENDANT FROM ATTEMPTING TO ACCOMMODATE FOREMAN BY MOVING HIM TO OTHER LEVEL SEVEN POSITIONS OTHER THAN EXPEDITER CONFLICTS WITH OTHER CIRCUITS.

As previously noted, Defendant originally failed to offer Foreman any job after he got the pacemaker. However, when Foreman filed an EEOC charge, Defendant finally agreed to give him a level one job as a janitor. The employer refused to consider

Foreman for any other position because it claimed that the Union contract made him ineligible for other positions.

Foreman could have been given the position of "receiving specialist," a position which was created while this litigation was pending. A receiving specialist is basically an "expediter" who rarely went into the shop and primarily works in inventory. R. Vol. 3 at 191-92. Defendant insisted that it could not give Foreman this position because the Union contract required the job to be filled on a seniority basis. A fellow expediter was given the position on the grounds that he had seniority over Foreman. *Id.* at 191-192.

Also, Foreman, and the Union as well, claimed that Foreman should have been given a materialsman position. Defendant conceded that a materialsman did not have to go into the shop. *Id.* at 180-181. While this litigation was pending, a position of materialsman became vacant and was filled by a person other than Foreman. *Id.* at 181. Defendant claimed it was entitled to give Foreman this position because the Union contract states that persons who had previously held a materialsman position would be first offered the job and Foreman had never previously been a materialsman.[5]

The Fifth Circuit held that the fact that a Union contract's requirement was an absolute defense to any ADA requirement that Foreman be moved to an alternative position. The Fifth Court said:

> We hold that the ADA does not require the employer to take action inconsistent with the contractual rights of other workers under a collective bargain agreement.

Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 809-810 (5th Cir. 1997).

The District Court, in *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997), held to the contrary by noting that it disagreed with the Seventh Circuit Court of Appeals in *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir.), *cert. denied*, __

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[5] In fact, Foreman had been a materialsman, but had not held this position, since Defendant had divided the materials man position into subcategories (A and B) under the Union contract. R. Vol. 3, p. 223.

U.S. __, 137 L.Ed.2d 480 (1997). *Aka* held:

> We reject the *Eckles'* court's analysis because the plain language of the ADA requires employers to provide accommodations to the disabilities of qualified employees unless the accommodation in question would be "unreasonable," or would impose an "undue hardship," *see*, 42 U.S.C. § 12112, because the suggested "reasonable accommodations" listed in the statute include several (among them the reassignment to a vacant position that Aka seeks) that commonly will conflict to some degree with the applicable collective bargaining agreement in unionized work places -- including the portions of those agreements creating seniority rights. . . . *see Id*, at § 12111(9); see also, *Eckles*, 94 F.3d at 1052; Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 Ky. L.J. 219, 234 (1993-94), and because both the legislative history of the ADA and the relevant EEOC regulations clearly indicate that the fact that a particular accommodation would require some departure from the terms of a collective bargaining agreement should not in itself determine the question of whether an employer may be required to provide the accommodation. See, *supra* . . .

116 F.3d 876 at 895-96 (D.C. Cir. 1997).

By holding that a Union contract always overcomes the duty of an employer to accommodate by moving to a vacant position, the Fifth Circuit in this case directly contravenes *Aka*, as well as the "middle" position adopted by the Seventh Circuit in *Eckles*, which limits the Union contract's power to overcome the duty of accommodation to seniority provision.

ARGUMENT IV

THE FIFTH CIRCUIT'S NARROW, RESTRICTIVE INTERPRETATION OF THE AMERICANS WITH DISABILITIES ACT IS INCONSISTENT WITH THE BENEFICIAL, BROAD INTERPRETATION WHICH SHOULD BE GIVEN CIVIL RIGHTS LAWS.

The Fifth Circuit's "Catch 22" interpretation of the Americans with Disabilities Act cries out for correction. Time and again, the Fifth Circuit has rejected an Americans with Disabilities Act claim on grounds that the employee is either not disabled enough or is too disabled to be qualified to work, or both. See, *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1995) (Severe complications from blood-clotting disorder not a disability); *Rogers v. International Terminal, Inc.*, 87 F.3d 755 (5th Cir. 1996) (Thirteen percent partial disability not a "disability"); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5th Cir. 1996) (Fifty percent loss of lung capacity not a disability); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996) (Insulin dependent diabetic not "qualified" for job because of assistance required from other workers).

These decisions, and this one, indicate an extreme reluctance to follow the basic principle that civil rights laws are to be "liberally construed to effectuate their remedial purposes." *Holt v. J.T.M. Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996) (Dennis, dissenting). *Monell v. New York County Department of Social Services*, 436 U.S. 658, 58 L.Ed.2d 611, 631-632, 98 S.Ct. 2018 (1978) (Civil right laws are given benevolent interpretations in view of their remedial purposes).

Respectfully submitted,

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APPENDIX A

JIM WAIDE
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

EARL FOREMAN

JUDGMENT IN A CIVIL CASE

VS.

BABCOCK & WILCOX CO.

CASE NUMBER: 1:95CV156-S-D

___ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered

IT IS ORDERED AND ADJUDGED

That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant Babcock & Wilcox Co. recover of the plaintiff Earl Foreman its costs of action.

July 23, 1996 **Norman L. Gillespie**
Date **Clerk**

ENTERED CV ORDER BOOK 49 _____
PAGE(S) 196 **(By Dep. Clerk)**
DATE 7/24/96

No.

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APPENDIX B

JIM WAIDE
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

EARL FOREMAN, Docket No. 1:95CV156-S-D

Plaintiff,

vs. Aberdeen, MS July 22-23, 1996

BABCOCK & WILCOX,

Defendant

TRIAL TRANSCRIPT
BEFORE THE HON. L.T. SENTER, JR.,
and a Jury

APPEARANCES:

For the Plaintiff: Hon. Jim Waide

For the Defendant: Hon. Taylor B. Smith
Hon. J. Wilson Eaton

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BENCH OPINION

THE COURT: The Court has before it the defendant's motion for judgment as a matter of law made at the close of all of the evidence in the case. This court is bound by the seminal case of *Boeing Company v. Shipman*, 411 F.2d 365, the 1969 Fifth Circuit case, setting forth the standard to be applied.

Briefly, the Court at this juncture accepts all of the evidence in the case in the light and with all reasonable inferences most favorable to the party opposed to this motion, that, of course, would be the plaintiff. And if the Court finds that the facts and inferences points so strongly and overwhelmingly in favor of one party that the Court believes that reasonable jurors could not arrive at a contrary verdict, then the granting of the motion for judgment as a matter of law is proper.

On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and the case submitted to the jury.

In this case, the plaintiff, Mr. Foreman, having been an employee of Babcock & Wilcox, the defendant, for some 22 years, and after suffering extensive heart problems and having taken medical leave on several occasions for his heart condition, but after each of these occasions having received a clean bill of health from his doctor to return to work, that is, being permitted to return to work without restrictions. Finally, in order to control his heart problems, Mr. Foreman had a pacemaker installed. The doctor that installed the pacemaker wrote a letter to the company, Babcock & Wilcox, with the limitation that the plaintiff, Mr. Foreman, was not to work within six feet of a welding machine. The evidence in this case shows that a bank of welding machines might require him to be further distance from them. Also, a high voltage line, and there were three of them coming in the shop, the evidence shows, would require his keeping his distance from this because of the electromagnetic fields, which presents a real possibility of interferences with his pacemaker.

The plaintiff was denied his proposed return to the job of expediter which he held prior to the installation of his pacemaker. Instead, it was the decision of Babcock & Wilcox, based on the letter from plaintiff's heart physician, that it would be dangerous to the health of the plaintiff if he were permitted to perform any sort of job that required him going into the shop areas where these electromagnetic fields were situated, welding machines, high powered lines, etcetera.

The defendant offered and plaintiff accepted a janitor position, the only job available to offer this plaintiff, and one in which he had previously been employed at one time. The plaintiff complains and brings his lawsuit pursuant to the Americans with Disabilities Act claiming that in requiring him to return to a janitor's job rather than placing him back in the expediter job with what he perceived to be reasonable accommodations was in violation of the Americans with Disabilities Act, found in Title 42, U.S.C. § 12101 et sequitur. In other words, the plaintiff claims that by defendant refusing to continue to employ him in a particular employment position, that is, the expediter position which he had previously held prior to the installation of the pacemaker, he was discriminated against and the defendant violated the ADA.

It is the plaintiff's theory that he could have been accommodated by the defendant in the expediter job. The plaintiff does not deny that the supplying of materials and parts to the fabricator or assembly shops was an essential function of the job of expediter. Indeed, the plaintiff's evidence shows that this is an essential duty of the expeditors. The evidence in the case, uncontradicted, clearly shows that an expeditor's purpose is exactly what the name implies, to expedite production by keeping the production people in supply of materials needed for them to perform their function.

What the plaintiff claims is, though, that someone else could be given this essential function of the expeditor job and he should then be permitted to perform all the other functions of an expeditor, that is, record keeping or other duties in the storage area. In effect, what the plaintiff is asking this court to do is hold that a new job or a new job category should be created to accommodate him. That job category

wuld be that of an expeditor but without having to supply the materials to the shop to expedite production.

The evidence in the case shows that the supplying of materials and the furnishing of materials from the storage area to the shop area is an essential function of the job of expeditor. Indeed, the plaintiff's own witness, presently an expeditor, testified that approximately one-third of the time of an expeditor was spent transporting and furnishing these materials.

As I mentioned when I solicited argument from counsel, it's not the function of this court to supplant the decision making process of manufacturers in this case. While, of course, a defendant manufacturer may restructure a job, here the plaintiff is not seeking merely restructure of this job. Unlike the accommodation given the gentleman who had had a workmen's comp injury, Mr. Ed Clardy, whose range of motion in his shoulder was limited, plaintiff seeks to entirely change one of his primary job functions. A range-of-motion impairment is totally different from being unable to work at all in a plant area that consumes a large portion of work duties.

I'm of the opinion that no reasonable jurors could in fact find that the plaintiff, under these circumstances, is a qualified individual with a disability, in that the plaintiff cannot perform the essential functions of the job of expeditor with or without reasonable accommodation. It is not a reasonable accommodation to require this manufacturer defendant to eliminate an essential function of the job of expeditor and in effect create a new job for the plaintiff. The plaintiff was given the only available job for which he was qualified.

Therefore, the Court is of the opinion that judgment as a matter of law should be entered for the defendant. The Court reserves the right to file it's written findings of fact and conclusions of law, amending, supplementing this brief bench opinion. And this cause is dismissed.

No.

In The

Supreme Court of the United States

October Term, 1997

EARL FOREMAN,

Petitioner,

vs.

BABCOCK & WILCOX COMPANY,

Respondent.

APPENDIX C

JIM WAIDE
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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-60510

EARL FOREMAN,

Plaintiff-Appellant,

vs.

THE BABCOCK & WILCOX COMPANY, ET AL.,

Defendants,

THE BABCOCK & WILCOX COMPANY,

Defendant-Appellee.

Appeal from the United States District
Court for the Northern District of Mississippi

REVISED OPINION

Before GARWOOD, WIENER, and DeMOSS, Circuit Judges.
DeMOSS, Circuit Judge:

The opinion issued in this case under date of May 22, 1997 is withdrawn and the following is issued in place thereof.

In this case under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq, Earl Foreman alleged at trial that his employer failed to reasonably accommodate Foreman's limitations arising from his heart condition. At the close of all evidence, the district court entered judgment as a matter of law in favor of the employer, holding

that the evidence could not support a jury finding that Foreman was either qualified for, or entitled to, the positions he sought. Foreman now appeals. For the following reasons, we AFFIRM.

BACKGROUND

Plaintiff/Appellant Earl Foreman ("Foreman") had been an employee of Defendant/Appellee Babcock & Wilcox ("B&W") for over 22 years.[1] B&W is located in West Point, Mississippi, and operates a welding and steel fabrication facility where it builds and welds industrial boilers and associated parts. B&W consists, in part, of two large buildings called "shops," where the boilers are assembled and welded. These shops contain approximately 400 welding machines and three electrical sub-stations. High voltage power lines run throughout the shops. Foreman was working at B&W as an "expeditor."[2] An expeditor makes deliveries of necessary materials and supplies to the shops, thereby expediting the manufacturing process. Expediters also unload trucks, receive materials, work on computers, and store inventory.[3] Under a collective bargaining agreement ("CBA") entered into with the workers' union,[4] Foreman's seniority entitled him to a "level seven" position as an expeditor.[5]

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[1] Foreman testified that he began working at B & W on September 13, 1974.

[2] Prior to working as an expeditor, Foreman worked at B & W as a "helper," "materialman assistant," "laborer," and janitor.

[3] While the exact job description of an expeditor is disputed, the following description, found within the record, sufficiently captures its essence:
Receives, checks, verifies and stores incoming storeroom material and products. Operates Lift Truck and similar vehicles to move materials and products from one location to another. Loads and unloads railroad cars, trucks, etc.
Expedites, moves and distributes items as required. Identifies items received, storage containers, bins, etc. Fills out purchase requisitions and submits for approval. Signs for items received. Uncrates items, obtains a running inventory on items in stock. Requires a knowledge of the shops and the locations of the various operations being performed.
Performs crane hooking and signals Crane Operator and/or operates floor-operated jib and semi-gantry cranes, two and four-wheeled hand trucks, crosstowns similar handling equipment. Works from prints, delivery orders, freight bills, purchase orders or other written and verbal instructions from Leader, salaried personnel or employee being assisted. Keeps work areas, machinery, and equipment clean and orderly.

[4] The International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, Local Lodge No. 903.

[5] It is not clear from the record what salary Foreman received as a level seven expeditor.

In March, 1994, Foreman underwent surgery and had a pacemaker installed by Dr. David H. Mulholland. In a letter dated May 3, 1994, Dr. Mulholland informed B&W that Foreman was medically restricted from working within six feet of any welding equipment because of possible electromagnetic interference with his pacemaker. Dr. Mulholland further restricted Foreman from working within 40-50 feet of the power lines which ran throughout the shops. It is undisputed that these limitations effectively precluded Foreman from working within the shop areas.

On the same date, May 3, 1994, Foreman also presented to B&W a short-term disability claim which was signed by Foreman's treating physician, Dr. Andrzej Wartak. This disability claim stated that Foremen [sic] needed to miss work from March 25, 1994 until June 13, 1994.

On June 13, 1994, Foreman did not return to work; instead, he submitted another letter from Dr. Wartak stating that Foreman should remain off work indefinitely. Dr. Wartak affirmed the work restrictions as set forth by Dr. Mulholland (presumably in anticipation of Foreman's eventual return to work).

In September 1994, Foreman filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that B&W discriminated against him by not allowing him to return to work as an expeditor, and by failing to reasonably accommodate him with a new position. Foreman also filed a grievance with his union. In response to Foreman's complaints, on September 26, 1994, B&W personnel manager Dale Ulbrich met with Foreman and union representative Robert Shaffer for the purpose of discussing Foreman's return to work.

It is unclear what was discussed during this meeting. Apparently, Foreman argued that he should be given another position of comparable pay. B&W denied both requests. B&W told Foreman that he could not return to work as an expeditor because the medical restrictions imposed upon him by his doctor precluded him from performing the essential job function of working in the shops. B&W also told Foreman that it could not offer him other requested positions because: (1) these positions did not exist or were not available and (2)

the "bona fide seniority provisions" of B&W's CBA prevented B&W from doing so.

Two weeks after this meeting, B&W offered Foreman a position as a level 1 janitor, a position which Foreman had previously held.[6] B&W maintains that this was the only position which it could offer Foreman given his qualifications, medical restrictions, job availability, and the seniority provision of the CBA. Foreman accepted the position of janitor.

In May 1995, Foreman brought suit in federal court alleging that B&W violated the Americans with Disabilities Act by failing to accommodate his alleged disability. In July 1996, the case was tried before a jury. At the close of Plaintiff's case, B&W moved for judgment as a matter of law. The district court held that "Plaintiff had proved, in the Court's opinion, that he has a disability." However, the district court denied B&W's motion pending further development of the facts "as to the essential functions of an expeditor."

At the close of all evidence, B&W made a renewed motion for judgment as a matter of law, contending that no reasonable jury could find either that Foreman was a qualified individual with a disability under the ADA, or that B&W failed to reasonably accommodate him. The district court granted B&W's motion, holding, *inter alia*, as follows:

> I'm of the opinion that no reasonable jurors could in fact find that the plaintiff, under these circumstances, is a qualified individual with a disability, in that the plaintiff cannot perform the essential functions of the job expeditor with or without reasonable accommodation. It is not a reasonable accommodation to require this manufacturer defendant to eliminate an essential function of the job of expeditor and in effect create a new job for the plaintiff.

The district court did not address the issue of whether the "bona fide seniority provisions" of B&W's collective bargaining agreement

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[6] Foreman states that a level 1 janitor earns approximately two dollars per hour less than a level 7 expeditor.

prevented B&W from giving Foreman another position. Foreman filed the instant appeal.

STANDARD OF REVIEW

We review *de novo* the decision of a district court to grant judgment as a matter of law, applying the same legal standard as it used. *Omnitech Int'l Inc. v. Clorox Co.*, 11 F.3d 1316, 1322-23 (5th Cir. 1994). Judgment as a matter of law is proper after a party has been fully heard by the jury on a given issue, and "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." FED. R. CIV. P. 50(a). In evaluating such a motion, formerly referred to as a motion for directed verdict, the court is to consider all of the evidence (and not just that evidence which supports the non-mover's case) in the light most favorable to the nonmovant, drawing all inferences in favor of the non-moving party, and leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986); *Conkling v. Turner*, 18 F.3d 1285, 1300 (5th Cir. 1994); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Boeing Co.*, 411 F.2d at 374. A motion for judgment as a matter of law "should not be decided by which side has the better of the case, nor should [it] be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. *Id.* at 374-75.

We must affirm a judgment of the district court if the result is correct, even if our affirmance is upon grounds not relied upon by the district court. *Elizarraras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980); *see Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979) (it is firmly established that an appellate court must affirm the lower court's judgment if the result is correct even though it is based upon an improper ground); *Securities & Exchange Commission v. Cheney Corp.*, 63 S.Ct. 454 (1943) (limiting the rule to cases where appellate court need not make findings of fact); *Williams v. AgriBank, FCB*, 972 F.2d 962, 964 (8th Cir. 1992) (holding that a judgment can be affirmed on any grounds fairly supported by the record); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996) (an appellee may

defend the judgment won below any ground supported by the record, even grounds not relied upon by the district court), *cert. denied*, 117 S.Ct. 1498 (1997).

DISCUSSION

We hold that Foreman did not adduce evidence which would allow a reasonable jury to find that he was disabled, as defined under the Americans with Disabilities Act. For this reason, we hold that judgment as a matter of law in favor of B&W is appropriate. Alternatively, we hold that the district court did not err in finding that Foreman failed to offer evidence upon which a jury could reasonably conclude that he was qualified for the position of expeditor, or that the accommodations which he requested were reasonable.

The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") is a federal anti-discrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to individuals without disabilities. 29 C.F.R. Section 1630, App. (1996).[7] The ADA expansively prohibits discrimination in employment against people with disabilities, providing that, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges, of employment." 42 U.S.C. § 12112(a).

A "disability" includes a physical or mental impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12102(2).

"Discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the

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[7] Pursuant to 42 U.S.C. Section 12116, the Equal Employment Opportunity Commission is authorized to issue regulations which effectuate the purpose of the ADA.

accommodation would impose an undue hardship on the operation of the business of such covered entity. . . " 42 U.S.C. § 12112(b)(5)(A).

Disability

Throughout this litigation, B&W has argued that Foreman is not disabled, as defined under the ADA. If Foreman is not disabled, he would not be entitled to a reasonable accommodation, nor would his qualification for the position sought be relevant. Thus, the first issue we must address is whether Foreman adduced evidence which would allow a reasonable trier of fact to determine that he was disabled. For the following reasons, we hold that he did not.

Under the ADA, a "disability" means: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Foreman does not argue that he is entitled to relief under the second part of this definition; however, he does argue that he is entitled to relief under parts one and three. Therefore, we must ask if Foreman had an impairment that substantially limited one or more of his major life activities, or was regarded by B&W as having such an impairment.

Substantial Limitation -- Foreman is considered disabled under the ADA if he is substantially limited in a major life activity. "Substantially limits" generally means (I) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average persons in the general population can perform the same major life activity. 29 C.F.R. § 1630.2(j)(1). Foreman argues that his pacemaker substantially limited him from the major life activity of working as an expeditor at the B&W facility. We disagree.

Pursuant to the Code of Federal Regulations, "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3) (1996) (emphasis in

original).[8] "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.. *Id.* "Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess, or talent." 29 C.F.R. § 1630.2(j), App. (1996); *see Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (1995). "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." C.F.R. Section 1630.2(j), App. (1996).

After reviewing the entire record, we hold that Foreman has offered no evidence upon which a jury could conclude that his heart condition, prior to the installation of his pacemaker, significantly restricted his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. Likewise, Foreman has offered no evidence upon which a jury could conclude that his heart condition significantly restricted his ability to perform either a class of jobs or a broad range of jobs even after the installation of his pacemaker. At trial and on appeal, Foreman argues that the *only* job which he was substantially limited from performing with his pacemaker was that of an expeditor. In fact, Foreman argues that he is fully capable of performing virtually every other job at the plant. The record is replete with such evidence.[9] Because the evidence so overwhelmingly indicates that Foreman was substantially limited by his alleged disability from performing only single, particular job, a jury

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[8] "The terms 'number and types of jobs' and 'number and types of other jobs' . . . are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few', 'many', 'most') from which an individual would be excluded because of an impairment." 29 C.F.R. Section 1630.2(j), App. (1996).

[9] For example, in his affidavit, Foreman states: "[T]he pacemaker does not keep me from doing any job at B & W so long as I am not within six (6) feet of an arc welder. Based on my experience at B & W, any job at B & W is within my capability except the actual operation of the welder and other jobs directly pertaining to welding." In his discrimination charge, Foreman states, "there are many jobs that I could do at B & W... ."

could not reasonably find that he has a substantial limitation in the major life activity of working, as contemplated by the ADA.

Regarded as Having a Disability --

Even though Foreman does not have a substantial limitation in the major life activity of working, he may fall within the statutory definition of disability if he was regarded by B&W as being disabled. There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability.":

> (1) [If he has] a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) [If he has] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;
> or
>
> (3) [If he has] none of the impairment defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1). Only subpart (1) is relevant to the instant case.

An individual satisfies subpart (1) of this definition if he has an impairment that is not substantially limiting, but the employer perceives the impairment as being substantially limiting. 29 C.F.R. Section 1620.2(1), App. (1996). An employer does not necessarily regard an employee as having a substantially limiting impairment

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In his own deposition, Foreman states, "[b]ased on my experience at B & W, any job at B & W is within my capability except the actual operation of the welder and other jobs directly pertaining to welding." In a letter by union President Robert Shaffer, which was offered as an exhibit by Foreman, Shaffer states, "[t]here are over 100 salary positions that I believe should be considered. . . ." When asked at deposition whether "there is any type of work that you contend that you are not able to do," Foreman replied, "No sir . . . other than maybe digging ditches or things like that . . . ." Foreman's doctor stated by letter that, "[w]ith his permanent pacemaker he will have one restriction, he will be unable to work around arc welding equipment. He will be able to perform other duties as long as he stays at least six feet away from an arc welder.

simply because it believes that she is incapable of performing a particular job; the statutory reference to a substantial limitations indicates instead that an employer regards an employee as substantially limited in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 (5th Cir. 1996); *see also* 29 C.F.R. Section 1630.2(j)(3)(I).

While it is uncontroverted that Foreman does have a heart impairment, as stated earlier, his impairment does not substantially limit a major life activity. Thus, for purposes of satisfying subpart (1) of the definition, the question is whether Foreman *was* treated by B&W as having an impairment that substantially limits a major life activity. After thoroughly and carefully reviewing the entire record, we find no evidence upon which a reasonable jury could determine that B&W perceived or treated Foreman's condition as being substantially limiting, as defined under the ADA.[10] Accordingly, Foreman has not shown that he was regarded by B&W as being disabled.

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[10] In fact, our review of the record indicates otherwise. When questioned on direct examination, B & W Training Coordinator Joe Stallings states:

> A. I wanted Earl to come back to work. I very well knew how to sympathize with him in his condition. The doctor hadn't said the he wasn't able to work. I certainly sympathize with him.
>
> Q. Why did you sympathize so much for him?
>
> A. Because I've suffered four heart attacks and bypass surgery myself, and I was blessed well enough that there was not any restriction, you know, placed on me and, you know, I could very well sympathize the way he was feeling.

On cross-examination, Stallings states:

> Q. Did you have any problems with Mr. Foreman coming back to work when his doctors would release him?
>
> A. No sir. I would have like for Earl to come back to work because he was not disabled.
>
> Q. You didn't regard him as disabled?
>
> A. No sir.

* * *

When questioned on direct examination, B & W Personnel Manager Dale Ulbrich stated:

> Q. Did you have any problem ever returning Mr. Foreman to work if he could perform the job?
>
> A. Absolutely not. That's why we have employees. We need employees to do the work.
>
> * * *
>
> Q. Had Mr. Stallings had any discussions with you before September 26, 1994 relative to Earl's condition?
>
> A. Yes. We did have some discussions. On several occasions, Joe had told me that Earl had talked to him about getting his disability retirement. We discussed what those procedures were. That he would have to have a statement from his doctor saying he was totally and permanently disabled. That's the requirement of our pension board down in New Orleans. At that time Joe asked if there was anything we could do to help him. That he sympathized with Earl. And I said it was strictly up to the physicians to determine whether or not he was disabled. But at this point, there was nothing saying he was disabled.
>
> * * *
>
> Q. Let me ask you this. At that time did you consider Earl disabled, unable to return to employment?
>
> A. No. Absolutely not. Any medical statements that we had said that he only had restrictions being around medical equipment.
>
> Q. Medical equipment?
>
> A. I'm sorry. Electrical equipment. I'm sorry. Beyond that, the doctors' statements said he could perform any other function. Earl, himself, as well as Robert, said that he was strong as an ox, strong in the back, that he could do anything. And that he, himself, felt that he could do any job either inside or outside of B & W, for that matter. I had no reason to believe he was disabled. I have known lot [sic] of people who have had pacemakers. Never considered them disabled. Joe has had a lot of heart problems. He's very physically active. In fact, the fellow that introduced me to my wife 20 years ago yesterday --

Qualified Individual

Alternatively, even if Foreman was disabled as defined under the ADA, he offered no evidence upon which a jury could find that he was a qualified individual. Under the ADA,

> [t]he term "qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individuals holds or desires. For the purposes of this sub chapter, consideration shall be given to the employer's judgment as to what functions of a job are essential . . . .

42 U.S.C. § 12111. Thus, "[w]hile the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the work-place based on the same performance standards and requirements that employers expect of persons who are not disabled." 29 C.F.R. § 1630, App. Background (1996).

> I forgot our anniversary, by the way – 20 years ago yesterday – has a pacemaker. He rides horse, ranches, farms. So I had no reason to believe that earl [sic] was in any way disabled because of a pacemaker. And also based on what he said and what his doctor said.

While Foreman alleges that Stallings had "heard enough" and was "determined" to place Foreman on disability retirement, the uncontroverted fact is that B & W continued to employ him, in spite of his heart condition. "An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general." *Chandler, v. City of Dallas*, 2 F. 3d 1385 (5th Cir. 1993); *see also Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (holding that an employer did not regard the employee as handicapped simply because it found that he could not meet the demands of a particular job). B & W's perception that Foreman was able to work in other areas was evinced [sic] by its retention of Foreman in a position that did not require him to go into the shop area. While we recognize that the position which Foreman was given was less desirable than that which he had held, the record overwhelmingly supports B & W's contention that the collective bargaining agreement guided by B & W's placement of Foreman, as opposed to any perception by B & W that Foreman was substantially limited.

The record is replete with evidence that an essential function of the expeditor's job is to carry materials into the shop areas.[11] While

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[11] On cross-examination, Stallings responded as follows:

> Q. Based on your 33 years of experience, do you know of any reason why the company could not have sent Mr. Foreman back as an expeditor and told the expeditors, Ya'll try to work this out without him going into the shop and see if that works out for you, for him to do the job with all of the duties except going into the shop, do you know of any reason why the company couldn't have done that?
>
> A. First off, the expeditor classification, as all other classifications, are negotiated through our bargaining agent, which is Local 903. Going into the shop is a major function of the Expeditor classification. And if you allow one employee the privilege in a case like that on a permanent basis, well, it could very well cause a lot of confusion within our contract and with our union members and cause confusion, you know, plant wide.

On direct examination, Ulbrich stated:

> A. As the name implies, the very reason for the existence of an expeditor is to move materials and parts from our storeroom to the employees on the floor so that they can produce the products that we build. It is the very reason it exists.
>
> * * *
>
> The absolutely most important job of an expeditor is to move the parts from the warehouse into the assembly areas in the shop or from one area of the shop to another area of the shop. The other duties, there are some that are important but they all serve that main function. For instance, they have to unload trucks. The reason you unload a truck is so that you can move it into the shop later. They work in the warehouse sometimes. The reason they pull things in the warehouse and pull things out of the warehouse are to get them to the shop. So probably the, after the main function of delivering to the shop, the second most important function would probably be unloading trucks. And then there are also some paperwork things involved, record keeping.
>
> Q. All right. Let me ask you this. Is an expeditor expected to, make delivery into the shop and another only expected to unload trucks and then maybe another one only to put into the storeroom, or how that is done?

A. All expeditors are required to do all functions of that job. One of the main problems we have in our whole assembly process or manufacturing process is getting various parts to the assemblers on time . . . .

So it is, therefore, very critical that every expeditor be able to get things into the shop. And that shipments are not delayed because one expeditor is just doing paperwork or just unloading trucks. Every expeditor has to make deliveries as soon as possible to make the operation as efficient as possible.

* * *

Every expeditor is required to deliver to the shop. That is as important to that job as, you know, it would be like a trial attorney that can't come into court. They all have to do that. Taxi cab driver has to be able to drive a taxi cab. I mean, that is the main reason that the job exists. We require every expeditor to go into the shop.

* * *

All of them are supposed to go into the shop on a daily basis. There are job descriptions that have been written. They are presented to the union and discussed with the union before they're put into effect. Everybody in that job classification draws the same rate of pay. And therefore everyone is expected to do the total of that job.

Q. Let me ask you this. On the day shift how many expeditors do you have?

A. We have four expeditors on day shift.

Q. And on second shift how many?

A. One.

On cross-examination, Foreman responded as follows:

Q. Now, the job of expeditor has different functions, doesn't it?

A. Yes.

Q. But certainly one of the functions, and an important function of the expeditor, is to get the material out of the storeroom into the shop area so that the boilers and the parts can be made: isn't that true?

A. True.

it is true that the expeditor's job is not limited to this role, it is uncontroverted that going into the shop area constitutes at least 20-30% of the expeditor's responsibility.[12] Based upon record before us, we hold that the district court did not err in determining that going into the shop area is an essential function of the expeditor's job, and that Foreman's pacemaker rendered him medically unqualified to perform that essential function.

Reasonable Accommodation

Foreman argues that the district court erred by holding that B&W was not obligated to provide a reasonable accommodation for the limitations arising from his alleged disability. In support of his argument, Foreman asserts that he is entitled to either of two proposed accommodations: a new job or an alteration of his existing job responsibilities. Specifically, he argues that he is entitled to at least one of the "100 salary positions" of which he claims he is capable of performing, or an alteration to his job as an expeditor, such that he not be required to make deliveries into the shop areas. After reviewing the entire record, we hold that, even if Foreman was disabled and qualified under the ADA, his requested accommodations are not reasonable.

The ADA defines "Reasonable Accommodation" as follows:

The term "reasonable accommodation may include --

---

* * *

Q. And the role of the expeditor is to get the material in that shop so it can be manufactured, isn't it?

A. Yes.

[12] On direct examination, when asked how much time an expeditor spends in the shop, Foreman's witness, fellow expeditor Ronnie Cliett, stated: "I would say on a good day about a third, I guess." On direct examination, Ulbrich stated: "That could vary from day to day. Anywhere from a third of an expeditor's time up to 60 percent, 50 or 60 percent or more. And some expeditors might be required and are required to be in the shop all day.

> (A) making existing facilities used by employees readily accessible to and usable by individual with disabilities; and
>
> (B) job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment of devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111. An employer is not required to create "light duty" jobs to accommodate. *Turco v. Hoechst Celanese Chemical Group, Inc.*, 101 F.3d 1090, 1094 (5th Cir. 1996).

In granting judgment as a matter of law in favor of B&W, the district court held, *inter alia*:

> In effect, what the plaintiff is asking this court to do is hold that a new job or a new category should be created to accommodate him. That job category would be that of an expeditor but without having to supply the materials to the shop to expedite production.
>
> * * *
>
> [H]ere the plaintiff is not seeking merely restructure of this job. . . . [P]laintiff seeks to entirely change one of his primary job functions.
>
> * * *
>
> It is not a reasonable accommodation to require this manufacturer defendant to eliminate an essential function of the job of expeditor and in effect create a new job for the plaintiff.

Foreman admits that, under the terms of the CBA, he would not otherwise be entitled to the reassignments which he seeks because

he does not have the requisite seniority.[13] However, Foreman argues that the seniority provision of the CBA violate the ADA because they preclude B&W from offering him these reassignments. Foreman argues that B&W's obligation to accommodate him under the ADA trumps B&W's obligation to honor its seniority provisions under the collective bargaining agreement. We disagree.

Following the other circuits which have considered this issue, we hold that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996) ("After examining the text, background, and legislative history of the ADA duty of 'reasonable accommodation', we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."), *cert. denied*, 117 S.Ct. 1318 (1997); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) (recognizing that plaintiffs' collective bargaining agreement prohibits their transfer to any other job because plaintiffs lack the requisite seniority).

Regardless, even if there were no CBA in place, B&W would not be obligated to accommodate Foreman by reassigning him to a new position. "[W]e do not read the ADA as requiring affirmative

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[13] On cross-examination, Foreman stated:

> Q. Now, of course, you know that under the union contract the company can't just arbitrarily place people in different jobs, because under the provisions of the contract they have to have previously worked in that job and have the necessary seniority?
>
> A. Yes.
>
> Q. And you don't expect the company to violate the union contract, do you?
>
> A. I never have.
>
> Q. And you wouldn't want them to, would you?
>
> A. No, sir.

action in favor of individuals with disabilities, in the sense of requiring disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more or no less." *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1263 (1997).

Additionally, Foreman offers no evidence showing that any of the requested positions are, or were, available. For the accommodation of a reassignment to be reasonable, it is clear that a position must first exist and be vacant. Under the ADA, an employer is not required to give what it does not have. Foreman also fails to offer evidence showing that he is otherwise qualified to meet the hiring criteria for these requested positions.[14] In other words, he has failed to establish that he possesses the requisite skill, experience, education, and other job-related requirements to qualify for these positions. Indeed, the record is bare as to what those prerequisites might be. In short, Foreman has not offered evidence upon which a reasonable jury could find that he is entitled to the accommodations sought.

CONCLUSION

Foreman did not adduce evidence which would allow a reasonable jury to find that he was disabled, as defined under the ADA. For this reason, we hold that judgment as a matter of law in favor of B&W is appropriate. Alternatively, we hold that the district court did not err in finding that Foreman failed to offer evidence upon which a jury could reasonably conclude that he was qualified for the position of expeditor, or that the accommodations which he requested were reasonable. For these reasons, the judgment of the district court is AFFIRMED.

Dated: July 10, 1997.

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[14] The determination of qualification is two-fold: (1) whether the individual meets the necessary prerequisites for the job, such as education, experience, skills, and the like; and (2) whether the individual can perform the essential job functions, with or without reasonable accommodation. *See*, 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m) 1994.

Supreme Court, U.S.
FILED
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No. 97-1044

In The

Supreme Court of the United States

October Term, 1997

EARL FOREMAN,

Petitioner,

vs.

BABCOCK & WILCOX COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

1. Earl Foreman, *Petitioner*

2. Babcock & Wilcox Company, *Respondent*

3. Jim Waide, *Counsel for Petitioner*

4. Taylor B. Smith, *Counsel for Respondent*

In addition to the Petitioner and Respondent and counsel as listed, the parent company of the Respondent is McDermott International, Inc. and Respondent has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
List of Interested Parties	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Counter-Statement of the Facts	1
Reasons for Denying the Writ	5
I. The Writ Should Be Denied Inasmuch As The Fifth Circuit Was Correct In Its Interpretation Of "Disability".	5
II. The Court Of Appeals Properly Held That Petitioner Was Not A Qualified Individual With A Disability.	9
III. The Action Of The Fifth Circuit In Upholding The Validity Of The Collective Bargaining Contract With The Union Was Appropriate.	16
IV. In Any Event, Respondent Reasonably Accommodated Petitioner.	20
Conclusion	22

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995) 14, 18

Bultemeyer v. Ft. Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996) 15

Byrne v. Bd. of Educ., Sch. of West Allis-West Milwaukee, 979 F.2d 560 (7th Cir. 1992) 7

Carrozza v. Howard County, 847 F. Supp. 365 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) 13

Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) 18, 19

Cheatwood v. Roanoke Industries, 891 F. Supp. 1528 (N.D. Ala. 1995) 10, 13

Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984) 18, 19

Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1263, 134 L. Ed. 2d 211 (1996) 13, 14, 18, 19

Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) 18, 19

Contents

	Page
Feliberty v. Kemper Corp., 1995 WL 35398, 4 AD Cases 875 (M.D. Ill. 1995)	13
Foreman v. Babcock & Wilcox, 117 F.3d 800 (1997)	17, 18
Harden v. Delta Air Lines, 900 F. Supp. 493 (S.D. Ga. 1995)	10, 12, 14
Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996)	8
Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985)	18
Jimeno v. Mobil Oil Corp., 66 F.3d 1514 (9th Cir. 1995)	8
Kramer v. State of Florida, 117 F.3d 1258 (11th Cir. 1997)	14
Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794 (D. Colo. 1995)	20
Marschand v. Norfolk and Western Ry. Co., 876 F. Supp. 1528 (N.D. Ind. 1995)	7, 20
Mason v. Frank, 32 F.3d 315 (8th Cir. 1994)	18, 19
Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993)	7

Contents

	Page
McDonald v. State of Kan. Dep't of Corrections, 880 F. Supp. 1416 (D.C. Kan. 1995)	13, 14
Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995)	10, 11, 12, 13, 18
Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997)	8
Otis v. Canadian Valley-Reeves Meat Co., 884 F. Supp. 446 (D. Okla. 1994), *aff'd*, 52 F.3d 338 (10th Cir. 1995)	13
Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997)	7
Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996)	14
Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755 (5th Cir. 1996)	14
Santos v. Port Authority of New York, 4 AD Cases 1245, 1995 WL 431336 (S.D.N.Y. 1995)	14
Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989)	18, 19
Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997)	7, 8
Tuck v. HCH Health Services of Tenn., Inc., 7 F.3d 465 (6th Cir. 1993)	15

Contents

Page

Turco v. Hoechst Celanese Chemical Group, Inc., 101 F.3d 1090 (5th Cir. 1996) 18

Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992) 7

White v. York Int'l Corp., 45 F.3d 357 (10th Cir. 1995) 9

Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) 18, 19

Statutes Cited:

42 U.S.C. § 12102, *et seq.* 1

42 U.S.C. § 12111(9) 21

Other Authorities Cited:

Collective Bargaining Agreement, § 8.03 17

EEOC Technical Assistance Manual at 11-18 (1992) .. 11

EEOC Technical Assistance Manual, Title I of the ADA, Section 3.10 14

29 C.F.R. § 1630.2(n) 11

29 C.F.R. § 1630.2(o) 14, 21

29 C.F.R. § 1630.2(n)(3)(i)-(vii) 12

STATEMENT OF THE CASE

Contrary to the Statement of the Case as stated by Petitioner, there is much more to be considered with respect to the proceedings. As the record in the lower court will reflect, Respondent timely filed a Motion for Summary Judgment contending *inter alia* that Petitioner did not have a disability within the meaning of the Americans with Disabilities Act (42 U.S.C. § 12102, *et seq.*, (hereinafter referred to as the "Act"). This Motion was overruled and the case proceeded to trial. As shown in the Opinion of the Court of Appeals for the Fifth Circuit, at the conclusion of Petitioner's case Respondent moved for Judgment as a Matter of Law contending *inter alia* that Petitioner did not have a disability within the meaning of the Act. This was overruled and the case proceeded and at the conclusion of all the evidence, Respondent made a Renewed Motion for Judgment as a Matter of Law and the District Court granted the Motion.[1] Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and as reflected in the record below, on May 22, 1997, the Court of Appeals issued an Opinion affirming the action of the lower court. Subsequent thereto, Petitioner filed a Petition for Rehearing *en banc*, which was denied by the Court of Appeals on July 10, 1997, at which time the court issued a revised Opinion.[2] Thereafter, and though the mandate was issued on August 1, 1997, Petitioner has now filed this Petition requesting *certiorari*.

COUNTER-STATEMENT OF THE FACTS

Respondent Babcock & Wilcox Company ("B & W") operates a welding and steel fabrication facility in West Point,

1. Petitioners' petition has contained as Exhibit "B" the transcribed Opinion of the Court granting Judgment as a Matter of Law.

2. The revised Opinion is contained in the Petition for Rehearing as Appendix "C" and is reported at 117 F.3d 800 (1997).

Mississippi. (R. at Vol. III, p. 153). At its West Point plant B & W builds and welds boilers for industrial and utility use, and also supplies parts for these boilers. (R. at Vol. III, pp. 154-155). Other than the office building and the storeroom, B & W's West Point facility consists of two large buildings called "shops." (R. at Vol. III, p. 168). The two shops are where B & W's finished product, boilers, are assembled and welded. (R. at Vol. III, pp. 91, 169-172, 173). There are approximately 400 welding machines in the shops and three electrical substations with high voltage (13,000 volts) power lines running through them. (R. at Vol. III, pp. 89-90, 174).

In March 1994, Petitioner underwent surgery and had a pacemaker installed by Dr. David H. Mulholland. (R. at Vol. III, p. 81). Petitioner was referred to Dr. Mulholland by his treating physician, Dr. Andrzej Wartak. (R. at Vol. III, p. 9). Petitioner was placed on medical leave at the time of his surgery. (R. at Vol. III, p. 156).

Sometime after the time of his surgery, Petitioner presented to B & W a short term disability claim form signed by Dr. Wartak on May 3, 1994 stating that he must be off work from March 25, 1994 until June 13, 1994. (R. at Vol. III, pp. 81-82, 156-157, also Exhibit D-2). Around this same time, B & W received a letter from Dr. Mulholland, also dated May 3, 1994, stating that Petitioner was medically restricted from working within six feet of an arc welding machine, because of the possibility that the electrical noise generated by the welding machine would cause his pacemaker to function incorrectly. (R. at Vol. III, pp. 82-83, 157, also Exhibit P-4). Dr. Mulholland further restricted Petitioner from coming within 40-50 feet of several welding machines as well as power lines. (R. at Vol. III, pp. 81-83). These restrictions eliminated Petitioner's ability to enter B & W's shop area, which contains over 400 portable welding machines, stationary welding machines and high voltage power lines. (R. at Vol. III, pp. 92-94). *See infra,* pp. 3-4.

June 13, 1994 passed, and Petitioner did not return to work. (R. at Vol. III, pp. 156-159). Rather, Petitioner submitted another medical excuse dated June 22, 1994 from Dr. Wartak stating that Petitioner should be off work indefinitely. (R. at Vol. III, pp. 62-63, 156-157, also Exhibit D-3). At trial, Dr. Wartak testified that he signed the report requiring Petitioner to be off work indefinitely and agreed that if it was sent to B & W, "that [is] what they would have to go on." (R. at Vol. III, pp. 13-14).

Dr. Wartak stated that Petitioner is medically restricted from working near potent electro-magnetical fields, including welding machines and other machinery. (R. at Vol. III, p. 13). As far as Dr. Wartak understood, B & W was trying to find a job for Petitioner that would fit within his medical restrictions. (R. at Vol. III, pp. 14-15).

Much to B & W's surprise (because they thought Petitioner was off work indefinitely), on September 14, 1994, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that there were many jobs Petitioner could have performed at B & W, but that he was not allowed to return to work. (R. at Vol. III, pp. 158-160).

On September 26, 1994 B & W Personnel Manager Dale Ulbrich met with Petitioner and Union Representative Robert Shaffer for the purpose of discussing Petitioner's return to work and finding a job for Petitioner at B & W. (R. at Vol. III, pp. 159-160). Ulbrich was the sole person who had the responsibility and prerogative of Respondent to return employees such as Petitioner to employment from leaves of absence. (Vol. III, pp. 153-154).

Before his pacemaker was installed, Foreman had worked as an expeditor. (R. at Vol. III, p. 50). An expeditor "expedites" B & W's manufacturing process by making deliveries of

materials and supplies to the shops, where the finished products are welded and made. (R at Vol. III, pp. 90, 168). Although at trial, witnesses gave differing percentages, ranging from twenty to sixty percent, concerning the amount of time an expeditor spends making deliveries to the shop, even Petitioner conceded he spent at least twenty percent (20%) of his time as an expeditor making shop deliveries. (R. at Vol. III, pp. 70, 23, 25, 195). The ability to make deliveries into the plant is an essential function of the expeditor position. (R. at Vol. III, pp. 168, 174). As its name implies, the expeditor position exists to "expedite" deliveries of materials to different parts of the plant, including making deliveries to the shop area where approximately 400 welding machines, including numerous portable arc welders, are present, along with multiple electrical substations and power lines. *Id.* Since Petitioner's medical restrictions prevented him from being in the presence of electro-magnetical fields, and more specifically prevented him from coming within six feet of one arc welding machine, and from coming within 40-50 feet of several welding machines and high voltage lines, Petitioner could not enter the shop area to perform this essential function. (R. at Vol. III, pp. 92-94, 174-75, 178).

While B & W was committed to accommodating Petitioner, his medical restrictions not allowing him to come within six feet of one welding machine or to come within 40-50 feet of several welding machines, as well as power lines, prevented him from returning to the expeditor position, a position Petitioner held before his pacemaker was installed and the one to which he wanted to be returned. (R. at Vol. III, p. 94, 178). As testified by Personnel Manager Dale Ulbrich, B & W could not return Petitioner to the expeditor position for two reasons: (1) at the time of Petitioner's return there were no openings in the expeditor position (in fact, the only opening for which Petitioner was qualified under the collective bargaining agreement was in

the janitor position)[3]; and (2) Petitioner could not perform the essential functions of the job because of his medical restrictions. (R. at Vol. III, pp. 162, 178).

Respondent has a union at its facility and the *bona fide* seniority provisions of the collective bargaining agreement prevent an employee such as Petitioner from transferring into another job if he does not have seniority and has not previously worked in that position. (Vol. III, pp. 40, 69-70, 160-165, and 254).

Further, at the September 26 meeting, Petitioner did not suggest his return to any alternative positions, nor did he demand to be returned to the expeditor position. (R. at Vol. III, pp. 162-63). Shortly after the meeting, Petitioner returned to work at B & W in the janitor position, the only position for which he was "qualified" according to the collective bargaining agreement.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE FIFTH CIRCUIT WAS CORRECT IN ITS INTERPRETATION OF "DISABILITY".

Petitioner initially points out that "on its own motion" and without the point being raised by the employer, the Court of Appeals held that Petitioner had no disability. This, of course, as shown earlier in the Statement of the Case is an improper recitation and belied by the Opinion of the Fifth Circuit. To be sure, and as the Fifth Circuit held, a judgment of the District Court must be affirmed if the result is correct even if the

3. (R. at Vol. III, pp. 69-70). *See also infra*, pp. 25-30.

affirmance is on grounds not relied upon by the District Court (117 F.3d at 804).[4] Noteworthy is the fact that Petitioner desires not to discuss whether or not, in fact, Petitioner had a disability. Indeed, in all probability, this is because of the fact that the clear Opinion of the Fifth Circuit based upon uncontradicted factual records and the applicable law clearly reveals that Petitioner was not disabled. (*See* 117 F.3d 804-806). Rather, Petitioner makes the ingenuous (and factually incorrect) argument that the Fifth Circuit did not consider the "regarded as having a disability" prong. (*See* p. 7 of Petition for Writ of Certiorari). This, of course, is incorrect as the court gave a very clear and cogent analysis as to why Petitioner was not regarded by Respondent as having a disability. (*See discussion of Fifth Circuit at* 117 F.3d 806-807). Indeed, the record below reveals without contradiction but Petitioner never contended that he was disabled within the meaning of the Act, but only that Respondent considered him as such. Thus, it is somewhat novel that Petitioner now contends that this point was not considered. Indeed, and in view of the fact that Petitioner alleged only that he was "perceived" by his employer as having a disability and admitted quite clearly that there were many jobs he could have performed, he has limited himself to meeting the definition of disability only through the "regarded as having such an impairment".

Petitioner goes to great length in his Petition (p. 7) to attempt to quote testimony from a representative of Respondent concerning matters which Petitioner wishes to think constitute "regarded as" being disabled. However, the record reveals that

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4. Of course, in addition to finding that Petitioner was not disabled within the meaning of the Act, the Fifth Circuit proceeded further to find that in any event, Petitioner was not a qualified individual with a disability, that reasonable accommodation had, in fact, been made consistent with the factual situation presented and the collective bargaining agreement. Thus, in any event, the opinion below was correct.

the witness quoted, by his own testimony, did not have the responsibility to return employees on leaves of absence, and indeed, had no role to play in actually returning Petitioner to employment. (Vol. III, pp. 126-127, 153-154, 159, 164). Indeed, Personnel Manager Ulbrich, as shown by the uncontradicted facts, was the one who actually returned Petitioner to employment after expiration of his leave of absence. (Vol. III, p. 164). Thus, so much for "regarded as being disabled".

An employer does not "regard" the employee as disabled simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Marschand v. Norfolk and Western Ry. Co.*, 876 F. Supp. 1528, 1540-41 (N.D. Ind. 1995); *Byrne v. Bd. of Educ., Sch. of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir. 1992); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993). To be sure, there is no dispute here among the circuits. Recently, the Ninth Circuit in *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997) had occasion to discuss the "regarded as" factor holding with the clearly established law that the fact that an employer may regard an individual as having a restriction to do one position but not foreclosing employment generally does not mean an employer regards one as having a disability. (121 F.3d at 541 citing cases). *See also Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997). Moreover, the factual situation here shows clearly Respondent, far from regarding Petitioner as having a disability within the meaning of the Act, actually met and counseled on September 26, 1994, with Petitioner as well as the union in an effort to find a suitable position. (*See* 117 F.3d at 807 n.10). Moreover, we are reminded that it was quite uncontradicted that as soon as Petitioner requested a meeting and as soon as Respondent learned that Petitioner was actually ready to return to work, a meeting was arranged to discuss with Petitioner his return to

work, which ultimately led to placing him in the position which he could perform based upon his medical restrictions and the union contract. (Vol. III, pp. 158-60; 162-63).

Cases cited by Petitioner do not support a contrary inference. *Holihan v. Lucky Stores*, Inc., 87 F.3d 362, 366 (9th Cir. 1996) simply shows that a plaintiff was terminated for excessive absence due to his aberrational behavior which the employer acknowledged was the reason for termination. Totally unlike the situation *sub judice*. Indeed, in the later Ninth Circuit decision of *Thompson v. Holy Family Hospital, cited infra*, the same Ninth Circuit went to great pains to distinguish *Holihan* as being an unusual situation relating to perception of an employee suffering from a disabling psychiatric condition. (121 F.3d 541, n.3). Certainly, the recent Ninth Circuit decision in *Thompson* supports the finding of the Court of Appeals in this case. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), cited by Petitioner on p. 19, is likewise mischaracterized by Petitioner. Unlike the situation *sub judice*, the evidence there was quite clear that the employer regarded plaintiff as being unable to perform any job — quite the opposite from *sub judice*, and this was because, in *Miners*, there was an ultimatum of "treatment or discharge". Again, it is note-worthy to remember that here, Personnel Manager Ulbrich actually met with Petitioner to find him another job and did so — placing him in another position — not exactly the perception of "regarded as being disabled". Likewise, *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995) cited by Petitioner on p. 19, is mischaracterized. There the plaintiff was admittedly permanently disabled because of a prior workers' comp finding and all parties agreed as such. He was, thus, informed that he would be administratively terminated or placed on unpaid leave — again, a quite different situation from that *sub judice*, and indeed a quite different situation from the later Ninth Circuit decision of *Thompson v. Holy Family*, cited *supra*.

In other words, there is no conflict between the decision of the Court of Appeals for the Fifth Circuit and the law generally.

II.

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER WAS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY.

Under Argument II, Petitioner makes the quantum leap that there was no accommodation (as shown herein-after, there was a clear accommodation and so found by the Court of Appeals). To be sure, it is settled law and beyond dispute that in order to be a qualified individual with a disability, an individual *must*, with or without reasonable accommodation, perform the essential functions of the employment position in question. Clearly, Petitioner was unable to perform the expeditor position, which was created essentially to move materials into the plant area where, as aforementioned, numerous electrical welders and electrical arc equipment was present. (*See Opinion of Court of Appeals at* 117 F.3d 808-809 n.11-12).[5] To be sure, as shown in the Record, Petitioner testified that an expeditor must spend at least twenty percent (20%) of his time making deliveries to the shop (Vol. III, p. 70), and Petitioner's chief witness, an employee who had been an expeditor for five (5) years, testified that expeditors spend at least one-third or thirty-three percent (33%)

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5. In discussing accommodation, Petitioner seems "to get the cart before the horse". Before one is entitled to protection of the ADA, including its reasonable accommodation provision, the individual must *first* establish he is a qualified individual with a disability, as set forth hereinafter. Unless a plaintiff can make such a showing, including that he or she can perform all the essential functions of the job, with or without reasonable accommodation, the court must grant an employer judgment as a matter of law. *See, e.g., White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).

of their time making deliveries to the shop. (Vol. III, p. 25). This witness further testified that on the second shift in which Petitioner was employed, there were only two expeditors working and thus, both expeditors were required to make deliveries to the shop at the same time. (Vol. III, p. 28). Moreover, the Personnel Manager for Respondent explained clearly the reason why Respondent considers the requirement that all expeditors make deliveries to the shop as important and critical. (Vol. III, p. 171). To be sure, there was no inconsistency here, and as found by the Court of Appeals and other circuits, the process for determining what job duties were essential functions was properly followed. *See, e.g., Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995); *Cheatwood v. Roanoke Industries*, 891 F. Supp. 1528, 1537 (N.D. Ala. 1995) (court examines essential functions in light of EEOC regulations); *Harden v. Delta Air Lines*, 900 F. Supp. 493, 496-99 (S.D. Ga. 1995). When analyzing whether the Petitioner was a qualified individual with a disability, the *Milton* court examined the plaintiff's evidence concerning job duties and applied the Equal Employment Opportunity Commission ("EEOC") regulations concerning the determination of essential functions, and the evidence for supporting same. *Milton*, 53 F.3d at 1124. The *Milton* court's analysis is as follows:

> The initial inquiry in determining whether a job requisite is essential is whether an employer actually requires all employees in the particular position to perform the allegedly essential function. *See* 29 C.F.R. Pt. 1630, App. § 1630.2 (n). An employer's judgment is also relevant evidence to be considered, as are the terms of any collective bargaining agreement. *Id.* This inquiry is not intended to second guess the employer or to require him or her to lower company standards. *Id.*

> The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability's qualifications for a job are evaluated in relation to its essential functions.

Milton, 53 F.3d at 1124 (quoting in part EEOC Technical Assistance Manual at 11-18 (1992)). Furthermore, the EEOC regulations (29 C.F.R. § 1630.2(n)) specifically approved of in *Milton* identify what evidence is relevant when determining what functions are considered essential:

Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3)(i)-(vii); *see also Harden*, 900 F. Supp. at 496-99, (Court examines essential functions through use of EEOC regulations).

Personnel Manager Dale Ulbrich testified that if B & W did not require its expeditors to make shop deliveries, B & W's production process would be slowed considerably. (R. at Vol. III, pp. 173-74).

Moreover, expeditor Ronnie Cliett also in effect testified about the consequences of not requiring all expeditors to make deliveries to the shop. Cliett testified that at times on second shift, when there are only two expeditors working, both expeditors may be required to make deliveries to the shop at the same time. (R. at Vol. III, p. 28). Logically, if one expeditor could not make deliveries to the shop on the second shift, then the delivery of materials on that shift would be decreased by fifty percent (50%).

The testimony is uncontradicted that all expeditors, as an essential function, are expected to enter the shop on a regular and daily basis on numerous occasions, and Respondent has never had an expeditor that was not required to deliver into the shop. (Vol. III, pp. 170-171, 174).

As stated in *Milton*, "It is the employer's province to establish what a job is and what functions are required to perform it." *Milton*, 53 F.3d at 1124. There is absolutely nothing in the record, as analyzed by relevant case law and EEOC regulations, which would lead to any result contrary to the District Court's finding — making deliveries to the shop area is an essential function of the expeditor position.

Aside from this, it is important to note that, as the Court of Appeals held, reasonable accommodation does not require removing or eliminating any of the essential functions of a position. (117 F.3d 809-810). Contrary to Petitioner's argument, the Fifth Circuit was correct in holding that Respondent was not required, in effect, to create a new position for Petitioner by allowing him to perform only those functions of the expeditor position which he felt he could perform nor was Respondent required to make or create a job for Petitioner.

It is now well-settled that the ADA does not require employers like B & W to create a new position to accommodate an allegedly disabled worker, or to otherwise alter the essential functions of the worker's position. *See Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995); *McDonald v. State of Kan. Dep't of Corrections*, 880 F. Supp. 1416, 1423 (D.C. Kan. 1995); *Cheatwood*, 891 F. Supp. at 1537; *See, e.g., Carrozza v. Howard County*, 847 F. Supp. 365, 368 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) (court refuses to read the ADA as requiring an employer to restructure a job as to change its fundamental requirements); *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F. Supp. 446, 449 (D. Okla. 1994), *aff'd*, 52 F.3d 338 (10th Cir. 1995) (the law is clear that reallocation of job duties constitutes a change in the essential function of Petitioner's job and is not required under the ADA); *Cheatwood v. Roanoke Industries*, 891 F. Supp. at 1537, (the ADA does not require employers to modify the actual duties of a job in order to make an accommodation for individuals who are not physically capable of performing them); *Feliberty v. Kemper Corp.*, 1995 WL 35398, 4 AD Cases 875, 877-78 (M.D. Ill. 1995) (medical director's requested accommodation of restricting his use of computer which was an essential function of the job, held unreasonable because it required the elimination of an essential function of his job.); *Milton*, 53 F.3d at 1124-25, ("an employer is not required by the ADA to reallocate job duties in order to

change the essential functions of a job); *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991)."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (an employer need not reallocate the essential functions of a job which a qualified individual *must* perform.); *Harden*, 900 F. Supp. at 498; *McDonald*, 880 F. Supp. 1416; *Santos v. Port Authority of New York*, 4 AD Cases 1245, 1995 WL 431336 (S.D.N.Y. 1995).

Additionally, the EEOC's ADA Interpretative Guidance interpreting 29 C.F.R. § 1630.2(o) concerning an employer's reasonable accommodation requirement, states that "An employer or other covered entity is not required to reallocate essential functions." Moreover, the EEOC Technical Assistance Manual concerning Title I of the ADA, Section 3.10, concerning job restructuring states: "However, an employer is not required to reallocate essential functions of a job as a reasonable accommodation." Thus, both case law and the EEOC agree that B & W was not required to reallocate or waive the essential function of making deliveries to the shop for Petitioner.

To be sure, there is no conflict among the circuits and Petitioner was not a qualified individual. *See, e.g., Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (ADA protects only Petitioner who can establish he or she is a qualified individual with a disability); *Daugherty*, 56 F.3d at 698-700 (same); *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996). *See also Kramer v. State of Florida*, 117 F.3d 1258, 1264 (11th Cir. 1997) (ADA defines a qualified individual as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires — plaintiffs admitted they could perform the essential functions and, in short, thus are not qualified individuals with a disability.)

Petitioner cites *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). Petitioner would have us believe that this case is authority for the proposition that there must be an attempt to restructure the plaintiff's job to accommodate him — which is not the factual situation presented in *Bultemeyer*. Indeed, in *Bultemeyer*, there was a factual dispute as to whether the employee could perform the essential functions of his job, either with or without reasonable accommodation. There, the court found that plaintiff was not given a chance to demonstrate he could perform the essential function and held:

> . . . in other words, had F.W.C.S. accommodated Bultemeyer by finding him another position or by simply sitting down with him and talking about the situation, he may have been willing and able to take the physical and report for work. . . .

(100 F.3d at 1285).

Obviously, it is undisputed *sub judice*, that Respondent did "sit down" with Petitioner for the specific purpose of placing him in a position for which he was eligible with regard to his medical restriction of not entering the plant and accommodating him with positions for which he was qualified under the union contract. This was also accomplished! Thus, far from being in conflict with *Bultemeyer*, the Court of Appeals in the instant case, squarely fits within *Bultemeyer*.

For the same reason, Petitioner's citation of *Tuck v. HCH Health Services of Tenn., Inc.*, 7 F.3d 465 (6th Cir. 1993), is again misplaced. *Tuck* does not stand for the proposition that the duty of reasonable accommodation requires an employer to modify there, a nurse's position. Indeed, in *Tuck*, after an injury, the employer made arrangements for plaintiff to be moved to another open position. (*Id.* at 470) (the exact situation *sub*

judice). The court found that, though plaintiff may not have been able to perform the essential requirements of her initial job (and thus, was not eligible for the same), there were other nursing positions open for which the court found that plaintiff could perform the essential functions. Thus, this case reaffirms that reasonable accommodation does not require elimination of essential functions, but requires an employee be considered for a vacancy which may be existing and for which the employee is "qualified". This is exactly what happened *sub judice* — the matter was reviewed by Respondent with Petitioner and Petitioner was offered and moved into a position in which he could perform the essential functions and which was permissible under the *bona fide* union collective bargaining contract.

III.

THE ACTION OF THE FIFTH CIRCUIT IN UPHOLDING THE VALIDITY OF THE COLLECTIVE BARGAINING CONTRACT WITH THE UNION WAS APPROPRIATE.

Perhaps more of a factual analysis is necessary here. In the Petition (p. 11), Petitioner alleges that he could have been given the position of "receiving specialist"; however, Petitioner admits that the person who received the position had more seniority over Petitioner. (Petition at p. 11). Next Petitioner alleges that he should have been given a materialsman position but was not given one because the union contract provides that only persons who have previously held such a position would be first offered the job and admittedly, by Petitioner's own admission, he was not so qualified. (Petition at pp. 29-30). Petitioner then makes an allegation that the materialmans position had been divided into subcategories (a) and (b) under the union contract, but his cite to the Record is erroneous in that he was referring to another position of Material Handler A, which was a position Petitioner

had never held and, thus, for which he was not eligible. (Vol. III, p. 222). Thus so much for misconstruing the uncontradicted facts![6] Under the collective bargaining agreement, B & W may not place an employee in a job classification unless he or she is "qualified" (*i.e.*, has previously held that job position) and possesses the seniority to hold that position. (R. at Vol. III, pp. 40, 164-65). Collective Bargaining Agreement, § 8.03 (Exhibit D-6). Thus, if B & W places an employee in a job position and the employee does not possess the requisite seniority and/or has not previously held the position, B & W violates the collective bargaining agreement. (R. at Vol. III, pp. 161-163, 164-165).

Indeed, Petitioner was not given the materialmans position — not only because he was not qualified by his own admission, but of more importance, because it is uncontradicted that classification does not and did not exist, and had not been an active classification for a considerable period of time. (Vol. III, p. 180). The law is legion to the effect Respondent was not required to make or create a position where one did not exist for Petitioner. *Foreman v. Babcock & Wilcox*, 117 F.3d 800, 809

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6. Personnel Manager Dale Ulbrich testified that Petitioner was not reassigned to the materialmans position for significant reasons that Petitioner omitted: "we don't have anybody in the classification materials man. That's an old classification we don't have any more." (R. at Vol. III, p. 180). Accordingly, this uncontradicted evidence reflects that not only would B & W have to violate the collective bargaining agreement to place Petitioner in the materials man position ahead of other employees with more seniority, in fact it would also have to create such a position! The ADA does not require this much.

Further, Ulbrich also testified that he could not place Petitioner in the newly created receiving specialist position because ex-expeditor Jimmy Arnold, who had more seniority than plaintiff, was placed in that position. (R. at Vol. III, pp. 191-192). "Employees go into jobs based on their seniority. [Arnold] had the seniority to go into that job." (R. at Vol. III, p. 192).

(1997) and *Turco v. Hoechst Celanese Chemical Group, Inc.*, 101 F.3d 1090, 1094 (5th Cir. 1996). Indeed, Petitioner was not given the receiving specialist position because the person who received it had more seniority and thus, was required under the union contract to be given preference to the same and the other position mentioned was one for which he was not qualified — but also, it no longer existed! (Vol. III, pp. 191-192).

Petitioner's argument, that he was somehow entitled to a preference and that the collective bargaining agreement violates the ADA, mischaracterizes the facts and ignores the overwhelming weight of authority. *See, e.g., Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996); *Benson*, 62 F.3d at 1114, (ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained *bona fide* seniority rights of other employees); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) (same); *Milton*, 53 F.3d at 1125 (same); *Daugherty*, 56 F.3d at 700. Contrary to the recitation of Petitioner, the Court of Appeals, almost without exception, adheres to the principle embraced by the Court of Appeals in this case. To be sure, the *possible* exception cited by Petitioner in his Brief does not warrant a writ of *certiorari*.

In *Eckles*, cited *supra*, the court found analogous cases decided under the Rehabilitation Act which did not require reassignment of a disabled employee in violation of a *bona fide* seniority system, and that a virtual *per se* rule has emerged that such reassignment is not required under the Rehabilitation Act's duty to reasonably accommodate. *Id.* at 1047-48 (citing *Shea v. Tisch*, 870 F.2d 786, 789-90 (1st Cir. 1989) (*per curiam*); *Carter v. Tisch*, 822 F.2d 465, 467-69 (4th Cir. 1987); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1251-52 (6th Cir. 1985); *Mason v. Frank*, 32 F.3d 315, 319-20 (8th Cir. 1994); *Daubert v. United States Postal Service*, 733 F.2d 1367, 1370 (10th Cir. 1984)). In addition, the *Eckles* court also found that the

legislative history of the ADA strongly supported the position that "bumping" another employee out of a position to create a vacancy for a disabled individual is not required. *Eckles*, 94 F.3d at 1049.

In upholding the properly negotiated union contract, the Court of Appeals quoted from *Daugherty*, 56 F.3d 695, *cert. denied*, __ U.S. __, 116 S. Ct. 1263, 134 L. Ed. 2d 211 (1996) the well-established law that the Americans with Disabilities Act is not an affirmative action statute but "prohibits employment discrimination against qualified individuals with disabilities, no more and no less". (117 F.3d at 810).

The ADA does not require an employer like B & W to accommodate a worker in a manner that would violate the rights of other employees under a collective bargaining agreement.[7] *See, e.g., Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Mason v. Frank*, 32 F.3d 315, 319-20 (8th Cir. 1994) (Rehabilitation Act); *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (*per curiam*) (same); *Carter v. Tisch*, 822 F.2d 465, 467-69 (4th Cir. 1987) (same); *Daubert*, 733 F.2d at 1370 (10th Cir. 1984) (same).[8]

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7. As clearly cited by the Court of Appeals, Petitioner testified that he actually did not want and was not asking the Court to intrude into or violate the union contract. (117 F.3d 809 n.13).

8. It is likewise important to note that notwithstanding the argument concerning the validity of the Collective Bargaining Contract, it is clear here that Petitioner did not have a disability, moreover, was not a qualified individual with a disability, but in any event, Respondent complied with the appropriate law relative to reasonable accommodation. Therefore, because these factors, individually and collectively, precluded Petitioner from recovering it would not be appropriate for the Court to grant *certiorari* on the Collective Bargaining Agreement because regardless of

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IV.

IN ANY EVENT, RESPONDENT REASONABLY ACCOMMODATED PETITIONER.

B & W's efforts to find Petitioner alternative employment positions, and Petitioner's acceptance and employment in a janitor position were more than a reasonable accommodation of Petitioner's alleged disability.[9] Accordingly, B & W's good-faith efforts to reasonably accommodate Petitioner protect it from liability in the present case. *See, e.g., Marschand*, 876 F. Supp. at 1543. By providing Petitioner with a janitorial job, B & W attempted in good faith to reasonably accommodate Petitioner's restrictions from working near welding equipment, as identified by his physicians.

Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794 (D. Colo. 1995) is a factually analogous case. In *Kuehl*, the entire basis of the ADA Petitioner's claim was that her employer Wal-Mart would not accommodate her chronic tibula tendinitis with the single acceptable accommodation of a stool to sit on as needed during the course of her shift as a door greeter. Wal-Mart offered the plaintiff two accommodations as alternatives to providing her with a stool. First, it offered to let her work a split shift that was compatible with the medical restrictions placed on the

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the holding relative to the Collective Bargaining Agreement, Petitioner is not entitled to recover! **Thus, even a contrary finding by this Court on the Fifth Circuit's Opinion re: the Collective Bargaining Agreement, still would not mandate reversal of the Opinion below!**

9. Respondent notes that B & W's janitor position is not the typical near-minimum wage position that the "janitor" title connotes; plaintiff was paid $10.16 per hour while working as a janitor for B & W. (R. at Vol. III, p. 96). Thus, B & W reasonably accommodated plaintiff.

plaintiff by her doctors. Wal-Mart also offered the plaintiff a job as a cashier in the tire mounting department, which would have allowed her to sit down periodically. The plaintiff rejected both of these alternative accommodations and continued to insist on accommodation in the form of a stool to use while on duty as a door greeter.

Contrary to plaintiff's desired accommodation, the court held that the accommodations offered by Wal-Mart were consistent with the ADA's definition of acceptable reasonable accommodations and met its ADA requirements. *Id.*, *citing* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o). In so holding, the Court stated:

> "[T]he purpose of an anti-discrimination act is not to provide those traditionally discriminated against with preferential treatment but rather with treatment equal to that accorded to others." *Robinson v. City of Friendswood*, 890 F. Supp. 616, 620 (D. Tex. 1995), *citing Wimberly v. Labor and Indus. Relations Comm'n of Mo.*, 479 U.S. 511 (1987). "The ADA does not require that an employer provide the best accommodation possible to a disabled employee." *Eckles*, 890 F. Supp. at 1399. "Nor is an employer required to accommodate a disabled employee in exactly the way he or she requests." *Id.* "The employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." 29 C.F.R. Part 1630, Appendix, § 1630.9.

Id. at p. 803.

Accordingly, accommodation of Petitioner by placing him in the janitor position met its responsibility under the ADA.

CONCLUSION

Petitioner did not have a disability within the meaning of the Act, and in any event, was not a qualified individual with a disability. Moreover, and in any event, Respondent made reasonable accommodation consistent with Petitioner's medical restriction and the valid requirements of the collective bargaining contract. In doing this, Respondent was properly cognizant of the fact that while employment discrimination against disabled persons was prohibited, the Act does not give such persons priority in reassignments over those who are not disabled. (*See* Ct. App. Opinion at 117 F.3d at 810).

Simply put, the Petition is without merit and should be denied.

Respectfully submitted,

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